91-964



NO. _____

# In the

# Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN DOHERTY,
PETITIONER,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

## Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

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## QUESTION PRESENTED FOR REVIEW

1. Whether the Massachusetts Supreme Judicial Court's conclusion that the constitutional error it found in the presumed intent instructions given at petitioner's trial was harmless beyond a reasonable doubt violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution due to the Supreme Judicial Court's failure to follow the standard for harmless error analysis announced by this Court in *Yates v. Evatt*, 111 S.Ct. 1884 (1991).

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COMMONWEALTH OF MASSACHUSETTS,
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## Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

Petitioner Stephen Doherty prays that this Honorable Court grant a writ of certiorari to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this case on September 12, 1991.

## OPINIONS BELOW

The petitioner Stephen Doherty and two others (John Campbell and Arthur Keigney), were tried in Norfolk County, Massachusetts before a jury and the Honorable Judge Keating from November 14-23, 1977, and the jury returned first degree murder verdicts against them. Their convictions were affirmed by the Supreme Judicial Court. *Commonwealth v. Campbell*, 378 Mass. 680, 393 N.E.2d 820 (1979), reproduced herein in the Appendix at A-1 to A-59.

Stephen Doherty filed the motion for new trial at issue here in the Supreme Judicial Court, and that Court remanded the motion to state Superior Court on March 13, 1989. (Previous motions for new trial had been filed and litigated, but are not relevant to the issues raised here.) The motion was assigned to a different Superior Court judge since the trial judge was deceased. On February 23, 1990 the Honorable Roger Donahue denied the motion in an unpublished decision without a hearing. A copy of that decision is reproduced

herein in the Appendix at A-60 to A-62. The petitioner pursuant to state procedural requirements sought leave to appeal from the denial of his motion from the Single Justice of the Supreme Judicial Court. The Honorable Justice Wilkins granted leave to appeal in an unpublished order, reproduced herein in the Appendix at A-63 to A-64. On September 12, 1991 the Supreme Judicial Court affirmed the denial of petitioner's motion for new trial with one Justice dissenting. *Commonwealth v. Doherty*, 411 Mass. 95, 578 N.E. 2d 411 (1991), reproduced herein in the Appendix at A-65 to A-89.

## JURISDICTION

The judgment of the Supreme Judicial Court was entered on September 12, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment provides in relevant part:

> .... No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

The federal questions sought to be reviewed here, the proper analysis under the Fourteenth Amendment of the presumed intent jury instructions given at the petitioner's trial, were first raised in petitioner's March 1989 motion for new trial. The state Superior Court denied the motion without a hearing on the erroneous grounds that these issues had already been adjudicated.

In seeking leave to appeal the denial of his motion, the petitioner raised these issues before the Single Justice of the Supreme Judicial Court. The Single Justice allowed the appeal, implicitly ruling under state law requirements for allowing such an appeal, that the issues raised were new and

substantial.

In his appeal before the Supreme Judicial Court the petitioner again pressed this due process issue, arguing that under state law procedural requirements it was properly raised for the first time in the March 1989 motion for new trial, and not barred by failure to object at trial or the filing of other post-conviction motions. The Supreme Judicial Court fully adopted petitioner's arguments that his due process claims were timely and properly raised under state procedural rules.

> "We conclude that the defendant has not waived or otherwise lost his right to a determination on the merits of his challenge to the jury instructions. . . . See Appendix at A-67.

A. The Erroneous Jury Charge.

In his charge to the jury the trial court said in relevant part as follows:

> "So how do you determine what is in someone's mind? Naturally, that is extremely difficult and so the law allows you to work backwards by taking the effect or killing, if you will, determining

> the killing, and inferring from that killing and from the acts of the participants what their intent was. *We are presumed to intend to do what we do do. Otherwise, we wouldn't have done it.*"
>
> Tr. 7-162 (emphasis added).

B. The Trial Evidence.

In the Supreme Judicial Court's decision on direct appeal in this case, that Court described the evidence against the two alleged principals, co-defendants Keigney and Campbell as "somewhat thin" and conceded that the evidence against petitioner Doherty presented an even "closer question". See Appendix at A-16 to A-18. Doherty was on the Commonwealth's theory the lookout for his co-defendants. His activity was innocent and turned into first degree murder because of his alleged state of mind at the time he engaged in it.

The victim Perrotta died of asphyxiation due to strangulation by ligature.[1] Tr. 6:37. His death occurred within three hours of the time his body was examined by Dr. Shenker around 9:00 p.m. on November 25, 1976. Tr. 6:12.

Perrotta, the three defendants, and Thomas Carden were inmates in Block A-2 at MCI Walpole. Tr. 3:12-14. There were 72 inmates in the Block, which had 3 tiers with 12 cells on each side of each tier. Tr. 3:12, 21. As you entered the Block there was a stairway on the right, and a second stairway on the same side further into the Block. Tr. 3:22. Perrotta's cell was the second cell in on the left side of the third tier. Tr. 4:64.

Perrotta was in Carden's cell from about 4:30 to 4:45 p.m. Tr. 4:72. Perrotta left in response to a call by someone, and when he returned 3-4 minutes later he was nervous. Tr.

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[1] The evidence is here stated in the light most favorable to the prosecution, in order to illustrate the extreme weakness of the Commonwealth's case.

4:72-74. Perrotta and Carden spoke, and then Perrotta left. Tr. 4:75-76. Carden proceeded up the rear staircase to the third tier a few minutes later. Tr. 4:75-76.

Carden described what happened next as follows:

> Q: And would you otherwise describe this meeting with Mr. Doherty? Tell the Court and jury just what happened.
>
> A: Well, I got to the third tier and I was proceeding down to Bobby's room and Stephen Doherty stopped me by putting his hand on my shoulder. He started a conversation and wanted to know if I wanted to buy some grass or something like that. He sort of held me up for a long while and he was talking in a very loud voice. And then approximately three or four minutes went by . . . .
>
> Q: And can you describe the position of Mr. Doherty with respect to you? Can you describe his position in reference to your position?
>
> A: Yes, sir. He was right in front of me.
>
> Q: Right in front of you?
>
> A: Yes.
>
> Q: Did you make any effort to get by him?
>
> A: Yes, sir, I did.
>
> Q: What effort did you make?
>
> A: I tried to pass him but he kept his hand on my shoulder.
>
> Q: Did you have occasion to see Mr. Doherty turn away from you at any

time?

A: Yes, I did.

Q: And what happened then?

A: That is when Bobby's door opened.

Q: And what did you observe?

A: I seen Arthur Keigney walk out and then I seen Bobby Perrotta walk out and then I seen Jackie Campbell walk out.

Q: And what about Doherty? Did he do anything at that time?

A: He immediately stopped the conversation and let me proceed.

Tr. 4:82-84

At the time Doherty stopped him there were many other inmates hanging around. Tr. 5:37, 40-41. Carden spoke with Perrotta who appeared very nervous. Tr. 4:85. Shortly afterward, a guard announced the 5:00 p.m. lockup and count.

When the lockup ended at 6:00 p.m., Carden immediately went upstairs to Perrotta's cell. Tr. 4:90. Perrotta was lying on the bed wearing headphones. Tr. 4:91-92. Later, Carden returned and knocked on the door. Tr. 4:95. Perrotta released an interior locking mechanism and let Carden in the cell. Tr. 4:95-96. After ten minutes, Carden left with

two bags of marijuana to place a bet in another cellblock. Tr. 4:96, 98.

Carden was logged out of Block A-2 at about 7:18 p.m. Tr. 3:126. Officer Peter McGuire received a call at about 7:20 p.m. that Perrotta had a visitor. Tr. 3:128. He shouted for Perrotta several times. Tr. 3:128. Officer McGuire got a second call on the Perrotta visit at about 7:30 p.m. Tr. 3:129. He walked to a position where he could see Perrotta's cell and shouted. Tr. 3:161. He saw no one there at first, but then an inmate came along. Tr. 3:161. McGuire at one time thought that inmate was Joseph Yandle. Tr. 3:164. The inmate entered Perrotta's cell, came out, and said Perrotta wasn't there. Tr. 3:129-130.

On hearing a second announcement of Perrotta' visitor Carden returned to Block A-2. Tr. 4:99. Carden got back just after 7:30 p.m. Tr. 3:131. Carden described what happened next as follows:

Q: And would you tell us what observations you made at that time, just what you did when you went into A-2, what you did and what you saw?

A: I walked in the block and I was looking up and I seen Stephen Doherty leaning over the tier in front of Bobby Perrotta' room.

Q: Is this to your left or right?

A: The stairs is on my right going in. I went up the stairs. There is a blind spot in the stairs. When I got to the second tier, Stephen Doherty was proceeding down to the back of the block and Arthur Keigney walked out of Bobby's room and then Jackie Campbell followed him out.

Tr. 4:99-100.

In addition, the jury's opportunity to fairly assess this evidence was seriously compromised because the trial court mistakenly believed that there had been evidence at trial of a meeting between the three defendants prior to Perrotta's murder. He expressed this belief in his instructions to the jury. See Tr. 7:156. This erroneous belief was obviously extremely prejudicial to petitioner Doherty.

## REASONS WHY THE WRIT SHOULD BE GRANTED

Although the Supreme Judicial Court in its decision claimed to be applying the standard for harmless error analysis of presumption language in jury instructions announced in *Yates v. Evatt*, 111 S.Ct. 1884 (1991), it completely failed to do so. *Yates* requires the reviewing court to assume that the jurors followed the erroneous instruction. Instead the Supreme Judicial Court used the device of speculating that the offending language was "ambiguous", and that it must have been understood in a limited and narrow way, unimportant to the question of the accomplice defendant's state of mind. *Yates* requires that the reviewing court make a judgment about the significance of the presumption language when measured against the other *evidence* considered by the jury on that issue. Instead the Supreme Judicial Court managed a *Yates* analysis without one word of discussion of the evidence before the jury on the issue of the accomplice's state of mind.

In effect, the Supreme Judicial Court relitigated and rejected the reasonable juror analysis of *Francis v. Franklin*, 471 U.S. 307 (1985), as its substitute for appropriate harmless error review. If the *Yates* standard, a standard which was carefully crafted after years of continuing litigation on the appropriate method of evaluating presumption instructions, is to have vitality, the Supreme Judicial Court's clear disregard of it should be addressed.

## ARGUMENT

### I. THE PRESUMED INTENT INSTRUCTION GIVEN WAS CONSTITUTIONALLY INFIRM, AND UNDER *YATES* CANNOT BE FOUND HARMLESS.

The presumed intent language used in the jury charge in this case[2] is in clear violation of federal

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[2] ". . . . so the law allows you to work backwards by taking the effect or killing . . . We are presumed to intend to do what we do do. Otherwise, we wouldn't have done it. . . . [I]f the intent of all of them or any two of them is to do grievous harm to the victim . . . then they are all equally guilty." Tr. 7:162-63.

constitutional jurisprudence. *See Francis v. Franklin*, 471 U.S. 307 (1985) ("[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted..."); *Sandstrom v. Montana*, 442 U.S. 510 (1979) ("[t]he law presumes a person intends the ordinary consequences of his voluntary acts"). There was no language that even came close to explaining this constitutionally infirm directive on intent.[3] *See Francis v. Franklin, supra.*

In his dissent in this case in the Supreme Judicial Court, Justice O'Connor noted that the majority recognized that the instruction was incorrect, that the majority recognized that the

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[3]The Supreme Judicial Court confused the issues of what elements the jury was instructed to find and how they were instructed to find them. It is true that the jury was instructed as to petitioner Doherty on the issue of joint venture and the state of mind required for a finding that he was a joint venturer. However, the jury was told in a clear unequivocal fashion that it could make that finding on state of mind by working backwards from the "effect" and presuming that the alleged participants intended to do what they did do.

petitioner Doherty's intent was the pivotal issue at trial, and that the majority evaded the impact of those factors by limiting how a reasonable juror could have understood the presumed intent instruction. By fiat the Supreme Judicial Court called the presumed intent instruction "ambiguous" and simply announced that a reasonable juror could have only understood the presumed intent instruction as it applied to the petitioner to mean that when he leaned over the rail, he intended to lean over the rail and that when he stopped the witness Carden from moving along the cat walk he intended to stop him from moving along the cat walk. Needless to say the prosecution was not so limited in arguing the impact of these actions to the jury. According to the prosecution these actions were intended to and did aid and abet the perpetrators. As Justice O'Connor pointed out in his dissent, a reasonable juror could well have understood the presumed intent instruction to mean that if the petitioner did in fact aid and abet the perpetrators, it would be presumed that he intended to do so, because otherwise he

wouldn't have done what he did. Far from being "ambiguous," the presumed intent instruction here was central, clear, and unequivocal.

> "So how do you determine what is in someone's mind? Naturally, that is extremely difficult and so the law allows you to work backwards by taking the effect or killing, if you will, determining the killing, and inferring from that killing and from the acts of the participants what their intent was. *We are presumed to intend to do what we do do. Otherwise, we wouldn't have done it."*

This instruction is not limited by its language to principals as opposed to accomplices. It told the jury to work backwards from the effect of the *participants*' acts. The jurors could presume that the participants intended those effects. The impact of this language on petitioner Doherty's case was devastating.

What the Supreme Judicial Court did here was to use sophistry to relitigate and blunt the teaching of the reasonable juror analysis of *Francis v. Franklin, supra*. Under the

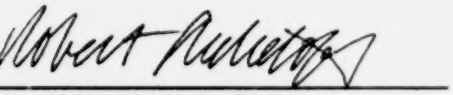
reasoning employed here, the Supreme Judicial Court would have found no problem with the language used in *Sandstrom* itself (presumption that person intends the ordinary consequences of his acts). The Supreme Judicial Court would have held that the charge would have only meant that when petitioner Doherty got in the way of the witness Carden it could be presumed that he intended the natural and probable consequences that Carden would be stopped. By playing games with the level of abstraction at which the presumption is applied, its force can be completely dissipated. Only if *Sandstrom* and *Franklin* are to be overruled can such a charade be permitted to stand. The *Yates* decision was not an invitation to overturn Sandstrom and Franklin in the guise of harmless error analysis. *Yates* was carefully and thoughtfully reasoned so that lower courts had clear notice of how to conduct harmless error analysis. Although the Supreme Judicial Court claimed to be applying the *Yates* standard it clearly rejected the teaching of *Yates*. Only the dissenting Justice was willing to

apply *Yates*. The *Yates* standard requires the reviewing court to accept the view that the jury considered the offending instruction and to evaluate the evidence independent of the instruction on the presumed fact. The dissenting Justice did both and concluded that the error was not harmless. The Supreme Judicial Court did neither. A fair review indicates that the independent evidence was extremely weak and that the error cannot be deemed harmless. Here, and on this record there is serious doubt as to petitioner's actual guilt. Were *Yates* followed, he would have a new trial.

## CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,
By his attorney,



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December 6, 1991

## APPENDIX

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Commonwealth v. John Campbell, Jr.
(and two companion cases[1])

Norfolk, February 6, 1979 - August 7, 1979.

Present: Hennessey, C.J. Quirico, Braucher, Kaplan, & Wilkins, J.J.

Homicide. Jury and Jurors. Constitutional Law, Jury. Practice, Criminal, Empaneling of jury, Examination of jurors, Location of defendant in court room, Access to witnesses, Discovery, Argument by prosecutor, View, Instructions to jury, Evidence, Expert opinion, Photographs.

INDICTMENTS found and returned in the Superior Court on February 3, 1977.

The cases were tried before Keating, J.

Usher A. Moren for Arthur Keigney.

Alan P. Caplan for Stephen J. Doherty.

Alfred E. Nugent for John Campbell, Jr.

Charles J. Hely, Assistant District Attorney, for the Commonwealth.

QUIRICO, J. Robert A. Perrotta was brutally murdered in his cell at the Massachusetts Correctional Institution (MCI)

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[1]One against Stephen J. Doherty and one against Arthur Keigney.

at Walpole on November 25, 1976. The defendants John Campbell, Jr., Stephen Doherty, and Arthur Keigney, who were all inmates at MCI Walpole on that date, were indicted, tried, and convicted of murder in the first degree as a result of this incident. Each was sentenced to "imprisonment in the state prison for life." See G.L. c. 265, §§1-2. Their appeals are before us under the provisions of G.L. c. 278, §§33A-33G, and raise a variety of issues.[2] We affirm the judgments.

The evidence against the defendants consisted primarily of the testimony of Thomas Carden, a close friend and one-time brother-in-law of the victim. Carden testified as follows. On November 25, 1976,

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[2]Errors assigned but not briefed are deemed waived. Commonwealth v. Adrey, 376 Mass. 747, 748 n.1 (1978). Commonwealth v. Horton, 376 Mass. 380, 387-388 (1978). S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974).

Carden, Perrotta, and the three defendants were inmates in Block A-2 at MCI Walpole. Carden lived in cell 40, which was the third cell on the left-hand side of the second tier. Perrotta occupied cell 62, which was the second cell on the left-hand side of the third tier.[3] At about noon on November 25, Carden and Perrotta ate Thanksgiving dinner together. Perrotta finished his own meal and made sandwiches from another inmate's meal. He carried these sandwiches out of the dining hall wrapped in napkins and concealed beneath his bathrobe or his coat.

Perrotta was present in Carden's cell from approximately 3:30 p.m. to 4:45 p.m. Neither inmate went to the evening meal. About 4:45 p.m., Perrotta left Carden's cell

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[3]The cells were counted from the front of the block in Carden's description. Testimony from correction officials explained that catwalks ran around the cellblock at the second and third tier levels. Stairways were located at the front and rear of the block on the right-hand side.

in response to a call by someone. A few minutes later, Perrotta returned in a visibl distressed state. After some conversation, Perrotta left Carden's cell again. Carden consulted his watch and, two minutes later, left the cell. He "hung around" on the landing of the rear stairway for about one minute and then walked up to the third tier landing.

Carden met the defendant Doherty on the third tier landing. Doherty put his hand on Carden's shoulder and talked in a loud voice about selling some marihuana to Carden. He prevented Carden from moving along the catwalk to get to Perrotta's cell. After an interval, the door to Perrotta's cell opened and Perrotta, Keigney, and Campbell walked out. Doherty thereupon stopped talking to Carden and allowed him to proceed to Perrotta's cell. Carden leaned against the rail and had a brief conversation with

Perrotta, during which Perrotta appeared "very nervous." Shortly afterward, a guard announced the 5 p.m. lockup and count, and Carden went back down to his own cell.

When the lockup ended at 6 p.m., Carden immediately went upstairs to Perrotta's cell. He observed Perrotta lying on the bed wearing headphones. About forty-five minutes later, Carden returned to Perrotta's cell and knocked on the door. Perrotta released an interior locking mechanism and invited Carden into the cell.[4] After ten minutes, Carden left the cell with two bags on marihuana in order to place a football bet in a neighboring cellblock. En route, Carden stopped briefly in the cell occupied by Thomas McInerney on the right-hand side of

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[4]Perrotta's door was locked from the inside with an illegal device called a "door peg." Carden had previously supplied the device to Perrotta and described it as "one of the better types." It could be released from outside the cell only with a tool and some patience.

the third tier.

While Carden was out of Block A-2 placing the bet, a visitor was announced fo Perrotta. On hearing a second announcement of Perrotta's visitor, Carden returned to Block A-2. As he entered the block, he observed Doherty leaning over the rail in front of Perrotta's cell. He proceeded up the front stairway. When he reached the second tier, he saw Doherty walking along t third-tier catwalk toward the rear of the cellblock and Keigney and Campbell leaving Perrotta's cell at a fast pace. No one els was present on the catwalk. Carden then proceeded up to Perrotta's cell, and, at about 7:30 p.m., discovered Perrotta's body

Peter McGuire was the correction offic in charge of Block A-2 during the evening o November 25. While locking Perrotta into t cell during the 5 p.m. count, McGuire "saw

flesh,"[5] and thereby assured himself that Perrotta was present. Based on the log he kept that night, McGuire testified that Carden left the block at 6:10 p.m., returning at 6:25 p.m., and left again at 7:18 p.m. At 7:20 p.m., McGuire was notified that Perrotta had a visitor. He shouted Perrotta's name but received no response. At 7:30 p.m., McGuire repeated the visitor announcement. An inmate, whom McGuire was unable to identify, was walking along the third tier at this time. This inmate looked into Perrotta's cell and told McGuire that Perrotta was not there. McGuire then telephoned other blocks to have the visitor announcement repeated there. Shortly thereafter, Carden entered Block A-2 in

---

[5]McGuire explained that, as part of his routine, he would make sure that some part of an inmate's skin was in sight in order to preclude the possibility of an inmate's leaving clothing in the bed while he was elsewhere.

apparent haste, and, looking up to the thi
tier and ignoring McGuire, he went up to
Perrotta's cell. Carden then called for a
stretcher.

Dennis Spicer, a prison medic, was summoned to Perrotta's cell at about 7:40 p.m. Perrotta displayed no signs of life, but his skin was warn and normal in color. There was a bright drop of blood on the pillow, but no blood on the bed. Dr. Haro
Shenker, a medical examiner, arrived in Perrotta's cell at about 9 p.m. Based on
own observations and those made by Spicer, Dr. Shenker determined that Perrotta had d
within two hours preceding 9 p.m. Dr. Geo
Katsas performed an autopsy on Perrotta's body at 4:15 p.m. on November 26. His examination disclosed several bruises and
bathrobe cords tied tightly about the neck
The victim's penis had been torn from his body and inserted into his mouth; this

dismemberment had been done, in Dr. Katsas's opinion, while Perrotta was alive. The stomach contained undigested chicken or turkey together with other food; the food had been in Perrotta's stomach for at most two hours preceding death. Dr. Katsas estimated the time of death as "shortly before" Spicer's observations and two to four hours before Dr. Shenker's, and he concluded that death had resulted from strangulation.

The defense evidence consisted solely of testimony aimed at contradicting subsidiary details in Carden's story and at otherwise discrediting Carden. Thomas McInerney was acquainted with Perrotta and Carden. He testified that Perrotta was rising from the Thanksgiving dinner table with a half-full tray when he arrived, that Perrotta was wearing dungarees and a T-shirt, and that he did not observe Perrotta make sandwiches or see any bulges in Perrotta's clothing.

McInerney also described a conversation at Bridgewater in which Carden asked McInerney to say he "saw something" on November 25, a suggested, "If you back me up, you might ev be able to hit the street behind this." McInerney stated that Carden had not visite his cell around 7 p.m.

One Ronald MacDonald testified to observing an argument between Carden and Perrotta within the week preceding the murd in which Carden expressed dissatisfaction with the way Perrotta was treating Carden's sister (formerly Perrotta's wife) and her children. Carden denied ever arguing with Perrotta about family matters. One Robert Guzowski stated that at some time no later than April of 1977, Carden told him at the Salem House of Correction that "when he got through with his trials and his cases, he w going to get away from here and go to Arizona." Carden denied mentioning a trip

Arizona during the pendency of the case.

1. Motions for directed verdicts. At the close of the Commonwealth's case in chief, and again after the summations,[6] each defendant moved for a directed verdict. Following argument, the judge denied the motions subject to the defendants' exceptions. In reviewing the denial of a motion for a directed verdict in a criminal case, we determine whether the evidence offered by the Commonwealth, together with reasonable inferences therefrom, when viewed in its light most favorable to the Commonwealth, was sufficient to persuade a rational jury beyond a reasonable doubt of

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[6]The timing of the motions was unusual in that they are normally made at the close of the Commonwealth's evidence and again before, rather than after, the closing arguments. See Rule 70 of the Rules of Superior Court (1974); Mass.R.Crim.P. 26 (b)(1) post 896 (effective July 1, 1979). Inasmuch as no argument is made by the Commonwealth that these motions were not timely made, we do not consider whether the judge was obligated to entertain them.

the existence of every element of the crim charged. Commonwealth v. Latimore, ante 6 676-677 (1979). See Jackson v. Virginia, U.S. 307, 318-319 (1979); Commonwealth v. Clark, ante 392, 403-404 (1979), and cases cited. Under this standard there was no error in denying the motions for directed verdicts.

General Laws c. 265, §1, provides: "Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a cr punishable with death or imprisonment for life, is murder in the first degree. Murd which does not appear to be in the first degree is murder in the second degree . . The degree of murder shall be found by the jury."

Speaking in general terms, we have defined the term "murder' used in this

statute to mean the unlawful killing of a human being by another human being with malice aforethought. Commonwealth v. Campbell, 375 Mass. 308, 312 (1978). Commonwealth v. Caine, 366 Mass. 366, 373 (1974). Commonwealth v. McCauley, 355 Mass. 554, 559 (1969). The indivisible phrase of art "malice aforethought" describes with particular mental state accompanying a homicide which makes the act murder and, in so far as is relevant to this case, encompasses the intent to inflict great bodily harm and the intent to kill. E.g., Commonwealth v. Hebert, 373 Mass. 535, 539 (1977); Commonwealth v. Manqum, 357 Mass. 76, 85 (197). See generally R. Perkins, Criminal Law 30-40 (1957).

A killing is premeditated if the "resolution to kill was a product of cool reflection." Commonwealth v. Blaikie, 375 Mass. 601, 605 (1978). "[N]o particular

length of time is required in order for deliberate premeditation to be found." Commonwealth v. Caine, supra at 374.

The use of extreme atrocity or cruelty, a second basis for finding the defendants guilty of murder in the first degree in this case,[7] was recently described in the following words: "This issue must be left largely to the jury . . .. There is no requirement that the defendant know that his act was extremely atrocious or cruel, and no requirement of deliberate premeditation . . .. A murder may be committed with extreme atrocity or cruelty even though death results from a single blow . . .. Indifference to the victim's pain, as well as actual knowledge of it and taking pleasure in it, is cruelty; and extreme cruelty is only a higher

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[7]There was no evidence that the killing in this case occurred during the commission or attempted commission of a felony so as to make the definition of felony murder relevant.

degree of cruelty" (citations omitted). Commonwealth v. Golston, 373 Mass. 249, 260 (1977), cert. denied, 434 U.S. 1039 (1978).

Applying these definitions, it is apparent that there was a case for the jury on this issue of murder in the first degree. The evidence tended to show that Perrotta died of strangulation following brutal dismemberment. The jury could infer that the wounds were not self-inflicted; that they were inflicted intentionally, with at least the purpose of causing grievous bodily harm to Perrotta; and that the use of two ligatures implied that the killing had been deliberately premeditated. The amputation of Perrotta's penis while he was yet alive could be found to have been extremely atrocious and cruel.

All the defendants argue, however, that the circumstantial evidence linking them with the crime was insufficient to warrant

submitting the case to the jury. Doherty argues in addition that there was insufficient evidence concerning his own state of mind to allow the jury to consider his guilt as a joint entrepreneur. We disagree.

The evidence against Keigney and Campbell, while somewhat thin, was sufficient to warrant submitting the case to the jury. Both defendants were seen leaving Perrotta's cell at about the time when the 5 p.m. lockup was announced and again at about the time when, according to one view of the medical evidence, the victim was slain. See Commonwealth v. Robertson, 357 Mass. 559, 562-563 (1970). THe jury could properly infer that the presence of Keigney and Campbell in Perrotta's cell was not for any normal purpose. See Commonwealth v. Belton, 352 Mass. 263, 266-267, cert. denied, 389 U.S. 872 (1967). Perrotta was nervous after

the first of these visits to his cell and he was found dead after the second. Moreover, the evidence that Keigney and Campbell failed to alert guards to Perrotta's condition permits an inference that they were not mere passersby who happened on the scene innocently. See Commonwealth v. Vellucci, 284 Mass. 443, 445-446 (1933). In cumulation, the various items of evidence and permissible inferences therefrom were sufficient to warrant the submission of the cases to the jury as against Keigney and Campbell.[8]

Although a somewhat closer question is

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[8]It was, of course, unnecessary for the Commonwealth to prove a motive for the crime, Commonwealth v. Goldenberg, 315 Mass. 26, 33 (1943), or to prove lack of opportunity by every other person. Commonwealth v. Adrey, 376 Mass. 747, 756 (1978), and cases cited. Similarly, it is of no particular moment that almost the entire evidence against the defendant came from one fellow inmate because questions of credibility are for the jury alone to resolve. Commonwealth v. McCauley, 355 Mass. 554, 560 (1969).

presented with respect to Doherty, we believe that the evidence was also sufficient as to him. Carden testified that Doherty obstructed his passage to Perrotta's cell shortly before 5 p.m. by placing a hand on his shoulder and engaging in loud conversation. He further testified that Doherty abruptly ceased these activities when Keigney and Campbell emerged from Perrotta's cell. Carden also testified to seeing Doherty leaning over the rail in front of Perrotta's cell just before the body was discovered. The jury might reasonably infer that Doherty was acting as a lookout on both occasions. If they so found, they would be justified in concluding that at the time Keigney and Campbell were murdering Perrotta, Doherty was present near the scene, purposefully aiding and abetting them in the commission of the crime, and that by reason thereof he was guilty as a principal. G.L.

c. 274, §2. See, e.g., Commonwealth v. Knapp, 9 Pick. 496, 518 (1830). Cf. Commonwealth v. Perry, 357 Mass. 149, 161-162 (1970).

The defendants make two arguments in support of their contention that verdicts should have been directed in their favor. First, they assert that evidence of mere presence at the scene of a crime is insufficient to support a conviction. See Commonwealth v. Clark, 363 Mass. 467, 473 (1973), and cases cited. As to Doherty, application of Clark and similar cases is inappropriate in light of evidence permitting an inference of his actual participation in the crime as an aider and abettor. Commonwealth v. Michel, 367 Mass. 454, 456-459 (1975). Commonwealth v. Conroy, 333 Mass. 751, 754-755 (1956). The reliance placed on this argument by Keigney and Campbell is also misplaced in light of the

evidence tending to show their commission of the crime. Second, the defendants argue that, because several inferences were possible from the fact of their presence in the cell, a guilty verdict would necessarily be based on conjecture or surmise. See, e.g., Commonwealth v. Fancy, 349 Mass. 196, 200 (1965), and cases cited. The only inference inconsistent with guilt suggested by the defendants, however, is that they were mere happenstance visitors to Perrotta's cell. Their failure to take any action on discovering the body weakens this inference. Although the inference suggested by the defendants is conceivable, "[i]t is sufficient that the evidence permitted the inference which the jury obviously drew against [the defendants]." Commonwealth v. Nelson, 370 Mass. 192, 203 (1976).

We hold that the judge correctly denied the motions of all three defendants for

directed verdicts of not guilty.

2. Selection of additional venire. During the first day of trial, eleven jurors were empaneled and the available venire was completely exhausted. The judge orally ordered fifty jurors to be brought in the next day.[9] Court officers chose names from past jury lists and made about eighty telephone calls, with the result that sixteen additional jurors appeared in court on the second day. Of the sixteen, ten listed themselves as retired, four as "housewife" or "at home," and two as employed. On seeing the list, counsel for the defendants challenged the array as not fairly representative of the community. After the judge denied these motions, counsel requested an opportunity to interrogate the responsible

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[9]The judge also issued a written order directing the sheriff to procure thirty persons "from the bystanders or from the County at large qualified and liable to be drawn as jurors."

court officer under oath or during a recess. The judge denied these requests as well. Three jurors were eventually seated from the group of sixteen additional veniremen.[10]

The defendants assert that the procedure used to obtain the sixteen additional jurors violated their constitutional right to trial by a jury drawn from a cross-section of the community and their right to have the jurors summoned under a regular, statutory procedure. We address these contentions in the order we have stated them.

a. Constitutional argument. We accept, arguendo, the defendants' unsupported assertion that the ten "retired" persons in the venire were older than sixty-five and that six other persons were younger. For the purpose of this appeal, we also assume that the high proportion of elderly persons in the

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[10]Two other jurors were seated on the second day from a group of seven taking from other court sessions.

additional venire could not have arisen by chance alone.

The Supreme Court has held that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). For the defendants to prevail on their claim of denial of this right, they must establish two facts. First, they must demonstrate exclusion of a constitutionally significant class of persons. See id. at 531-533; Duren v. Missouri, 439 U.S 357, 364 (1979); United States v. Hawkins, 566 F.2d 1006, 1014-1015 (5th Cir.), cert. denied, 439 U.S. 848 (1978). We may assume without deciding that persons under sixty-five, who were substantially underrepresented in the additional venire, possess characteristics sufficiently discrete to justify treating

them as such a class.[11] See United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970); J. M. Van Dyke, Jury Selection Procedures 35-39 (1977). But see Commonwealth v. Johnson, 372 Mas. 185, 198 (1977); Commonwealth v. Lussier, 364 Mass. 414, 423-424 (1973); United States v. Test, 550 F.2d 577, 590-593 (10th cir. 1976).

There exists, however, a second prerequisite to a successful Sixth Amendment

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[11]We emphasize that the record is devoid of evidence to justify the conclusion that young persons either have or lack attitudes or abilities that differ from those of older persons in ways having constitutional significance. We acknowledge Mr. Justice Marshall's admonition that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable . . . [and to deprive] the jury of a perspective on human events that may have unsuspected importance . . . ." Peters v. Kiff, 407 U.S. 493, 503-504 (1972). The Supreme Court has never, however, held that age classification in jury selection are constitutionally suspect. See Hamling v. United States, 418 U.S. 87, 137 (1974).

challenge. In the Taylor case, the Court emphasized that it imposed "no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." 419 U.S. at 538. Rather, the Court held only that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof" (emphasis supplied). Id. Accord, Duren v. Missouri, supra; Commonwealth v. Williams, ante 217, 221 (1979). A finding of a systematic exclusion of young persons would be wholly unwarranted on the present record, which shows only the bare facts about one specific venire containing only sixteen persons. See United States v. Whiting, 538 F.2d 220, 222 (8th Cir. 1976).

We must, therefore, conclude that no

Sixth Amendment violation was made out. We are unable to determine from the record before us whether the evidence sought to be obtained by examining the court officer who supervised the summoning of the additional venire would have been relevant to the crucial question whether elderly persons were systematically overrepresented in Massachusetts venires. It is unnecessary for us to consider whether the judge's denial of an immediate opportunity to adduce such evidence was constitutional error. Cf. Test v. United States, 420 U.S. 28, 19 (1975) (error to deprive defendant of immediate access to master jury lists). This is because defense counsel could have interviewed the court officer at some other time during or after the court day on which the question was raised, and they could then have renewed their motion to quash based on the information gained thereby. It does not

appear from the record that they attempted to do this. From all that does appear the judge merely exercised his discretionary control over the selection of jurors in declining to interrupt the empaneling process for an immediate voir dire or recess. Cr. Commonwealth v. Amazeen, 375 Mass. 73, 83 (1978); Commonwealth v. Montecalvo, 367 Mass. 46, 51 n.3 (1975). There is no merit in the additional contention of Keigney and Campbell that their rights to confrontation were somehow infringed: the court officer was not a witness against them in any criminal proceeding.

The record now before us does not adequately raise the issue whether the procedure used to select the additional venire comported with the Massachusetts Constitution as interpreted in Commonwealth v. Soares, 377 Mass. 461 (1979). We therefore express no view concerning that

issue. See id. at 493 n. 38.

b. Statutory argument. The defendants also argue that the procedure used to summon the additional venire was statutorily irregular, and they ask us to reverse their convictions on that ground alone. The skeleton, but not the details, of the procedure to be followed when a venire is exhausted is set forth in G.L. c. 234, §27: "If, by challenge or otherwise, a sufficient number of jurors duly drawn and summoned cannot be obtained for the trial of a case, the court shall cause jurors to be returned from the bystanders or from the county at large, to complete the panel, if there are on the jury not less than seven of the jurors who were originally drawn and summoned as before provided. The jurors from the bystanders shall be returned by the sheriff or his deputy or by a disinterested person appointed therefor by the court, and shall be

such as are qualified and liable to be drawn as jurors." Although the precise nature of the defendants' argument is unclear, they appear to ask us to hold as a matter of statutory construction that the informal procedure adopted by the court officer for summoning "talesmen" under this statute, with its inherent capacity for discrimination and unauthorized exemption was illegal. See Commonwealth v. Dickerson, 372 Mass. 783, 792-795 (1977). We decline to hold.

The use of talesman to supplement ordinary jury pools is of great antiquity, dating in Massachusetts from St. 1699-1700, c. 1, §4, and in England from St. 35 Hen. 8, c. 6 §6 (1543). Se generally 3 W. Blackstone, Commentaries 364-365 (Christian ed. 1807); 4 id. at 354-355. Although Parliament may have initially conceived that talesmen would be chosen at random from the crowd of bystanders, one of the few appellate

decisions considering the allowable methods of selecting talesmen concluded that choosing names from the regular jury lists was permissible. Rex v. Dolby, 107 Eng. Rep. 322, 324-325 (K.B. 1823). The only Massachusetts case on point reached a similar conclusion. See Commonwealth v. Sacco, 255 Mass. 369, 416-418 (1926). In both cases, the courts focused their analysis on the absence of proved bad faith or demonstrable prejudice. 107 Eng. Rep. at 324, 255 Mass. at 417. In Dolby, the court also noted the desirability of allowing officials to exercise discretionary selectivity and thereby avoid random choice. 107 Eng. Rep. at 324.

The reasoning in Dolby and Sacco is incomplete by modern standards, for it encompasses only considerations akin to due process and ignores the values of representativeness and randomness now thought

implicit in the right to jury trial. Cf. Taylor v. Louisiana, supra at 528. In the absence of proof that the Massachusetts jury system, including the occasional use of talesmen, operates generally to produce unrepresentative juries, however, fairness to an individual defendant remains as the only relevant criterion for measuring the selection process in a particular case. Fairness in turn depends on the absence of prejudice to the defendant.

The defendants have not shown that they were prejudiced by the manner in which talesmen were summoned. Cf. C.L. c. 234, §32 (irregularity in jury selection not reversible error unless objecting party injured thereby or unless objection made before verdict); Commonwealth v. McKay, 363 Mass. 220, 222-223 (1973) (semble) (injury must be shown even if objection timely). We may conclude only that the court officer had

the opportunity to pick and choose the talesmen. As Dolby and Sacco demonstrate, the use of substantial discretion in the summoning of talesmen has ample historic antecedents and cannot be said to be inherently unfair. Moreover, the need for talesmen is presumably infrequent, and we are loath to set down inflexible constraints for what amounts to an emergency power to complete a jury. Accordingly, we hold that no reversible error has been demonstrated.

3. Manner and content of voir dire. The defendants challenge the method by which the judge interviewed prospective jurors. The method was as follows. The clerk would draw and announce the names of jurors selected from the jury pool until every seat in the jury box was full. The judge would then ask a number of questions to determine whether the jurors selected stood indifferent. A juror desiring to make an affirmative

response would raise his or her hand and be heard by the judge at the end of the bench farthest from the jury. After excusing some jurors on the basis of their answers, the judge would direct the clerk to draw and call enough additional jurors to replace those previously excused. The question, answer, and end-of-bench conference cycle would then be repeated until the judge was satisfied with the jurors then filling the box. Thereupon, the Commonwealth would exercise its peremptory challenges, and the box-filled process would resume. When the judge and the Commonwealth were both content, the defendants would exercise their peremptory challenges. This process continued until sixteen jurors were finally seated. All during the process, jurors who were part of the jury pool but not yet selected sat in the back of the court room where they could hear the judge's questions. Indeed, the judge

shortened his statement of the voir dire questions after the first time in reliance on what the jurors had already heard.

Prior to embarking on this method of conducting voir dire, the judge denied motions that each prospective juror be questioned individually. There was no abuse of discretion. Commonwealth v. Montecalvo, 367 Mass. 46, 48-51 (1975), established that a judge may propound voir dire questions collectively. As we noted in Commonwealth v. Jackson, 376 Mass. 790, 799 (1978), collective questioning does not necessarily inhibit truthful answers. And, as we held in Montecalvo, the deprivation of an opportunity for observing a prospective juror's demeanor lacks legal significance. 367 Mass. at 50.

The defendants nonetheless argue that individual voir dire was mandated by the second paragraph of G.L. c. 234, §28, inserted by St. 1973, c 919, and amended by

St. 1975, c. 335. That paragraph provides: "For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall . . . examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination . . . shall be conducted individually and outside the presence of other persons about to be

called as jurors or already called."

If we were to assume, without deciding, that questioning jurors at the end of the bench farthest from the jury box was not "outside the presence" of other prospective jurors, that assumption would avail the defendant nothing because they failed to show any substantial risk that their cases would be decided on extraneous considerations. In the circumstances of this case, when the principal evidence against the defendant came from a prison inmate, the prejudice, if any, by jurors against inmates as a class would be likely to favor the defendants as to harm them. There was, therefore, no need for individual questioning.[12]

4. Court room seating. Before trial,

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[12]Because there was no demonstrated risk of decision on extraneous grounds, it was within the judge's discretion whether to ask additional questions beyond those mandated by G.L. c. 234, §28, First. See Commonwealth v. Horton, 376 Mass. 380, 393 (1978), and cases cited.

Doherty's counsel asked that Doherty be permitted to sit at the counsel table in order to facilitate consultation as the trial progressed. The judge denied the request and ordered all defendants seated in the front spectator bench, some distance from the counsel table. In addition to asserting generally that the court room seating plan abridged the right to effective assistance of counsel, Doherty notes two incidents that, he says, prejudicially inconvenienced his defense.[13] We perceive no error.

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[13]At one point during the voir dire of prospective jurors, the judge explained for the record "that counsel . . . is discussing the selection of jurors with the defendant." The second incident occurred during the direct examination of Officer McGuir and is reflected by the following colloquy between the judge and Doherty's lawyer:

THE JUDGE: "If you have any puzzlement, Mr. Caplan, I would appreciate it not being reflected on your face as you look at your client."

COUNSEL FOR THE DEFENDANT DOHERTY: "If your Honor please, I looked at my client, as I think I have a right to do, but I . . .."

THE JUDGE: "I am interpreting your expression. I do not appreciate it.

We have repeatedly held that court room seating is a matter within the discretion of a trial judge. Commonwealth v. Walker, 370 Mass. 548, 573-574, cert. denied, 429 U.S. 943 (1976), and cases cited.[14] We have, moreover, consistently rejected claims that separate seating impermissibly diminishes the effectiveness of counsel. Commonwealth v.

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[14]The United States Court of Appeals for the First Circuit has recently commented adversely on the Massachusetts practice of requiring prisoners to sit in a "dock." Walker v. Butterworth, 599 F.2d 1074, 1080-1081 (1st Cir. 1979), rev'g 457 F.Supp. 1233 (D.Mass. 1978). For the time being at least, the rule stated in the text may not apply to the prisoner's dock in a Massachusetts court room.

In this case, however, the defendants were seated in spectator seats rather than the dock. "The impression that [the defendants were] somehow different or dangerous" (id. at 1080) would not, we presume, be so great as to fall within the Walker rule. Clearly, the defendants must be seated somewhere if they are to be accorded their constitutional right to be present at their trial. Equally clearly, no every incident or circumstance which focuses the jury's attention on the fact that the defendants are the persons on trial can be considered to invade constitutional rights.

Bumpus, 362 Mass. 672, 680 (1972), judgment vacated and remanded on other grounds, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66 (1974). Guerin v. Commonwealth, 339 Mass. 731, 734-735 (1959).

Doherty has not shown that communication at any particular juncture was both impossible and essential to securing a fair trial. We therefore see no reason to abandon our settled rule that seating is within a judge's discretion. The two incidents isolated by Doherty do not indicate that counsel was hampered in conferring with his client. They exemplify the judge's control over the conduct of the trial, but they do not, without more, show interference with the effectiveness of counsel. We are not persuaded that these particular comments by the judge prejudiced the defendant, and we therefore express no view concerning their propriety.

5. The Carden interview. During a recess, defense counsel sought to interview Thomas Carden before he took the stand. Carden was being held in custody in the basement of the court house. Counsel requested that others initially present in the detention room - including the district attorney, the court clerk, and two correction officers - leave, and this request was honored. Counsel also requested that the door be closed to ensure privacy. This request was denied on the ground that a correction officer had to keep Carden in view at all times. Carden declined to be interviewed. In a subsequent lobby conference, the judge denied motions to bring Carden before the court for the purpose of informing him of his right to consult with defense counsel if he so desired. The defendants now argue that the circumstances of the meeting between Carden and counsel,

coupled with the judge's refusal to apply pressure from the bench, constituted prejudicial error.

Since the decision in Commonwealth v. Balliro, 349 Mass. 505 (1954), it has been the settled law of this Commonwealth that defense attorneys are entitled as of right to access to witnesses who are in the custody of the Commonwealth. Id. at 516-517. Accord, Commonwealth v. Flynn, 362 Mass. 455, 461 (1972); Commonwealth v. Carita, 356 Mass. 132, 142-143 (1969). The right encompasses only the opportunity for an interview, and a prosecution witness is free to talk with defense counsel or not, as he chooses. Commonwealth v. McLaughlin, 352 Mass. 218, 223-224, cert. denied, 389 U.S. 916 (1967). Cf. Commonwealth v. Carita, supra (Ballira rule unsatisfied where prosecutor communicated witness's refusal). If an interview occurs, however, it should be

"without the presence of the prosecutor or police officers." Commonwealth v. Flynn, supra. Commonwealth v. Doherty, 353 Mass. 197, 211 (1967), cert. denied, 390 U.S. 982 (1968). In addition, where there is a reasonable question whether or not the witness has voluntarily refused an interview, the preferable procedure is for the trial judge to inform him of the defendant's right to an interview and of his own right to refuse one, and to obtain his expression of consent or nonconsent on the record. Commonwealth v. Carita, supra at 143.

We have never held that every reluctant witness should be required to appear before the court for the purpose of expressing a demonstrably informed refusal to talk with defense counsel. Used as a matter of course, such a procedure would produce unwarranted delays in pending trials and would, in many cases, be likely to engender resentment or to

overbear the witness's free choice. In a case such as Commonwealth v. Carita, supra, where counsel are unable to communicated directly with the witness to request an interview, formal record proceedings may be entirely appropriate. In a case such as this one, however, where access is arranged informally through the cooperation of the prosecutor, an equally informal expression of refusal by the witness is adequate. Since Carden, the witness in question, was a prisoner serving a sentence, we discern no error in the positioning of a correction officer outside the open door to the detention room where the interview would take place. The record affords no basis for concluding that this security measure significantly deterred Carden from granting an interview. Security considerations practically demanded that a guard be nearby since Carden had, in fact, previously escaped

from a Massachusetts house of correction.

In short, the circumstances of the Carden interview do not require reversal. The case of Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978), offers no comfort to the defendants, for it requires a threshold showing of prejudice that our own cases do not require. Compare id. at 87-88, with Commonwealth v. Balliro, supra at 517. In any event, the defendants had made no constitutional argument relative to the Carden interview beyond merely citing Salemme. We therefore express no view on any Federal questions that may be implicated. See Commonwealth v. Adrey, 376 Mass. 747, 756 (1978); S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974).

6. Handling of discovery motions. Before and during the trial, the defendants made a number of motions for discovery of certain documents. As a result of these

motions, the defendants were furnished with unedited copies of Carden's testimony before the grand jury on two separate occasions and with the unedited copy of an interview between police officials and Carden on December 11, 1976. At the direction of the judge, the prosecution edited a transcript of an interview with Carden on December 1, 1976, and turned an edited copy over to the defense. Police Detective Lieutenant William Bergin, who conducted the initial investigation of the murder, prepared a report dated November 29, 1976, in which he described his initial investigation. When the existence of this report came to light during trial, the judge refused to order the Commonwealth to turn it over to the defendants, to read the report and determine its relevance, or to identify and preserve the report for purposes of this appeal. Finally, the defendants at various times

moved to inspect records concerning Carden and Perrotta that were maintained by correction officials. When the designated records were produced pursuant to a subpoena, the judge refused to allow defense counsel to inspect them, to read them himself to determine their relevance, or to identify and preserve them for purposes of this appeal.

We are confronted on this appeal with a situation where the record prevents us from performing meaningful review with respect to the withholding of these various documents from the defendants. Cf. Commonwealth v. Pisa, 372 Mass. 590, 598 n.6, cert. denied, 434 U.S. 869 (1977). The judge plainly had the responsibility to review and pass on the propriety of any editing of the record of the December 1 interview with Carden rather than to delegate that job entirely to the prosecutor. He further should have identified and preserved as part of the

record on appeal the report prepared by Lieutenant Bergin and the records subpoenaed from the Department of Correction. See Commonwealth v. Lewinski,. 367 Mass. 889, 803 (1975); Mass.R.Crim.P. 23(c), post 893 (effective July 1, 1979). His failure to perform these judicial tasks leaves the case in a posture where we have nothing to review beyond his failure to act, but where there is no indication as to whether the judge's error was harmful. In these circumstances, although we affirm the convictions, we do so without prejudice to the right of the defendants to seek further relief by motions for new trials on the ground that the denial of their requests for access to the various documents deprived them of fair trials.

It may prove helpful for us to amplify the considerations which may become relevant in ruling on future motions for new trial in these cases. On motion of the district

attorney, we impounded a copy of the report by Lieutenant Bergin and made it a part of the record. See Commonwealth v. Lincoln, 368 Mass. 281, 285 n. 2 (1975). We have examined it and believe that defense counsel ought to be shown a copy thereof for their own evaluation, particularly because it contains a description of how Lieutenant Bergin first learned the names of the defendants from Carden on the day following the murder. Cf. Commonwealth v.. Gilbert, 377 Mass. 887, 892-894, (1979) (duty of prosecution to disclose certain oral statements of witnesses to avoid misleading defense). Arguing with the knowledge of how the report might have assisted their trial or preparation of the case, counsel may be able to persuade the judge that justice requires a new trial.

Somewhat different considerations appear relevant with respect to the institutional records subpoenaed from the Department of

Correction. Our cases are very clear that a prosecutor has no duty to investigate every possible source of exculpatory information on behalf of the defendants and that his obligation to disclose exculpatory information is limited to that in the possession of the prosecutor or police. Commonwealth v. Adrey, 376 Mass. 747, 753-754 (1978). Commonwealth v. Lewinski, supra at 899-900. Commonwealth v. Gilday, 367 Mass. 474, 487, 489 (1975). Commonwealth v. Stone, 366 Mass. 506, 510-511 (1974). Given the size of the government of this Commonwealth, it makes no practical sense to require the prosecutor to obtain and carefully comb the records concerning Carden and Perrotta in the remote hope of discovering something that might tend to exculpate the defendants. This is especially true when the defendants were themselves free to interview the officials having personal

knowledge of the facts recorded in the documents sought to be inspected. Accordingly, we see no obligation for the prosecutor to obtain the institutional records for the purpose of turning them over to the defendants. The obligation, if any, of the Department of Correction to turn the records over to the defendants, even pursuant to a subpoena, presents a separate question, however, that the defendants may wish to explore on motions for new trials. General Laws c. 124, §1(j), c. 127, §§2, and 28-29, and c. 6, §§167-178, among others, may be relevant in exploring this question. Beyond suggesting it, we intimate no view as to its correct resolution.

Finally, we believe that, in considering motions for new trials, the judge himself should review the unedited version of the Carden interview to determine, based on his experience in conducting the trial, whether

relevant information was excised by the district attorney.

7. The prosecutor's summation. Near the end of his summation, the prosecutor discussed the credibility of the defense witnesses McInerney, MacDonald, and Buzowski. Concerning them, he said, "Well, those guys simply represent something that I asked you folks to make observations about at the outset as to why you think we have one prime witness and why we are so doggone fortunate to have even that one. Wasn't that a united inmate front, a united front of inmate society against you and you and everybody else in this state?" All defendants moved to strike this statement and requested an instruction that the jury disregard it, asserting that it was prejudicial and unsupported by evidence. The judge denied the motion.

In one aspect, the prosecutor's remark

about "a united inmate front" can be understood purely as an attack on credibility. As such, it was clearly warranted by the conflicting evidence on collateral issues that concerned Carden's credibility - namely, argument with Perrotta, the attempt to suborn McInerney's testimony, and the trip to Arizona. See Commonwealth v. Fitzgerald, 376 Mass. 402, 422-423 (1978), and cases cited. It was a reasonable inference from the evidence that the three inmates who testified for the defense had coordinated their testimony, and the prosecutor's restrained suggestion of this inference was not improper. Cf. Commonwealth v. MacDonald (No. 1), 368 Mass. 395, 401 (1975) (characterizing testimony as "rankest perjury that will probably ever be heard in a courtroom" questionable but not reversible error).

In another aspect, the prosector's

remark can be understood as an explanation and apology for the weakness of the Commonwealth's case. That is, the jury might have been led to think that the fear of reprisal shared by inmates prevented the Commonwealth from producing more direct proof against the defendants. The tendency of the remark to induce such thought was beyond the evidence actually introduced, for there was no direct testimony suggesting the existence of such shared fear. The jury were entitled, however, to use their common sense on the question whether inmates are likely to come forward to accuse other inmates. See Commonwealth v. Fitzgerald, supra 420; Commonwealth v. McColl, 375 Mass. 316, 323 (1978). Even in this second aspect, therefore, the prosecutor's remark cannot be considered improper.

8. Time of death testimony. Dr. Shenker's opinion as to the time of

Perrotta's death was property admitted. A witness's qualification to render an expert opinion is a question for resolution by the trial judge, whose conclusion will not lightly be overturned. Commonwealth v. Haas, 373 Mass. 545, 563 (1977), and cases cited. A medical opinion concerning time of death is not objectionable merely because it is not based on objective scientific tests. Id. at 563. Commonwealth v. Russ, 232 Mass. 58, 74-75 (1919). Thus, the failure of Dr. Shenker to employ a rectal thermometer went only to the weight of his testimony and not to its admissibility.[15] Finally, an expert may base an opinion in part on facts placed in evidence by other witnesses, and it is

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[15]There was testimony that a human corpse loses heat at a rate of about one and one-half degrees an hour under certain conditions. Although a rectal thermometer would have provided some objective evidence concerning the time of death, there was testimony that the estimate thus derived would be merely one factor in arriving at a medical opinion.

therefore no ground of objection that Dr. Shenker answered on the assumption that Spicer's observations were correct. See, e.g., Commonwealth v. Gilbert, 366 Mass. 18, 25 (1974); Commonwealth v. A Juvenile, 365 Mass. 421, 438 (1974).

9. Jury view. There was no abuse of discretion in denying the defendants' motions for a jury view of cell block A-2. See Commonwealth v. Curry, 368 Mass. 195, 198 (1975), and cases cited; G.L. c. 234, §35. Our review of the transcript persuades us that the jury were able to understand distances, angles, and physical layout from oral testimony given in conjunction with projected slides. See Commonwealth v. Chance, 174 Mass. 245, 247 (1899).

10. Photographs of Perrotta. The contention of Keigney and Campbell that the judge should have excluded color photographs of Perrotta's body is wholly without merit.

The photographs were relevant on the question of extreme atrocity and cruelty. See Commonwealth v. Bys, 370 Mass. 350, 357-361 (1976). They accurately portrayed the appearance and location of the body as it was when Dr. Shenker observed it. Cf. Commonwealth v. Allen, 377 Mass. 647, 678-680 (1979) (questioning admission of photographs portraying post-mortem decomposition); Commonwealth v. Richmond, 371 Mass. 563, 565-566 (1976) (error to admit picture depicting horrible post-mortem injuries).

11. Miscellaneous alleged errors. We have considered all the other alleged errors argued by the defendants and conclude that they are not sufficiently meritorious to warrant extended discussion.

a. We see no error in declining to question prospective jurors about bias formed as a result of having previously been peremptorily challenged by one of the defense

attorneys. There was no showing that any juror had been so challenged. In any event, all jurors were questioned generally about bias.

b. The mere showing that the Commonwealth interviewed a number of prison inmates does not, without more, create an obligation to tell the defense the result of the interviews or an obligation to tell the defense the results of the interviews or the names of inmates interviewed. See Weatherford v. Bursey, 429 U.S. 545, 559-561 (1977). There is no showing on this record that defense counsel attempted to learn from any other source the names of inmates present in MCI Walpole on the day of the killing or to interview any of them. The prosecutor had no obligation to act as an investigator for the defendants. These facts to no reach the point of implicating the rule of Brady v. Maryland, 373 U.S. 83, 87 (1963), requiring

the prosecution to disclose evidence favorable to the defense on request. See United States v. Agurs, 427 U.S. 97, 112 (1976); Commonwealth v. Adrey, 376 Mass. 747, 753-754, (1978), and cases cited.

c. To the extent that the judge limited or restricted the cross-examination of Officers Carr and McGuire and inmate Carden, he acted within his discretion. See, e.g., Commonwealth v. Adrey, supra at 751-753. We think the issues sought to be explored -- Perrotta's use of a door peg, the lighting conditions in the cellblock, and Carden's use of drugs -- were already before the jury with sufficient clarity.

d. The claims of alleged errors in the judge's charge are based on the lifting of certain phrases and fragments of phrases from their context in the charge as a whole. We have repeatedly said that a charge must be construed as a whole and that, in

consequence, isolated misstatements or omissions do not necessarily constitute reversible error. Commonwealth v. Watkins, 377 Mass. 385, 388 (1979). Commonwealth v. Hicks, 377 Mass. 1, 9-10 (1979). Commonwealth v. Grace, 376 Mass. 499, 500-501 (1978). None of the portions of the charge isolated by the defendants violates this test.

12. Relief under G.L. c. 278, §33E. As required by G.L. c. 278, §33E, we have carefully reviewed the entire record on the law and the evidence. We are persuaded that no miscarriage of justice occurred in this case. Accordingly, we grant no relief under §33E.

13. Conclusion. The judgments are affirmed.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 68154

STEPHEN DOHERTY

v.

COMMONWEALTH OF MASSACHUSETTS

COURT'S MEMORANDUM ON
DEFENDANT'S MOTION FOR A NEW TRIAL

The indictments in this case were returned in the Superior Court of Norfolk County on February 3, 1977. The defendant's case, also involving two other defendants, was tried before Justice Keating (now deceased). The defendants and tow others were found guilty of Murder in the First Degree. The defendant was represented by Alan P. Caplan, a very experienced trial lawyer, specializing in criminal cases.

An appeal on this case was heard and decided by the Supreme Judicial Court in 1979. Every available issue was

argued by the defendants on appeal from the means by which the trial jury was selected, the rulings and evidence by the trial justice, pre-trial motions, and the trial justice's charge to the jury. The conviction was affirmed in a 26-page decision. *Commonwealth v. Campbell*, (Doherty and Keigney), 378 Mass. 680.

The defendant retained new counsel who filed a motion for a new trial, allegedly raising issues left undecided by the Supreme Judicial Court. After an evidentiary hearing in November, 1984, Justice Keating denied the motion for a new trial. The defendant sought to appeal from this ruing and Single Justice, Wilkins, J., denied said appeal. Subsequent to that, the defendant retained new counsel, who brought a habeas corpus petition in 1986 in the Federal District Court. This petition was denied on March 5, 1987, by Justice Mazzone. New counsel was then retained by the defendant to pursue the issues in the habeas corpus proceeding in the Federal Court, and relief was denied by the First Circuit Court of Appeals on

January 26, 1988, *Campbell v. Fair*, 838 F.2d 1 (1st Cir. 1988). The issues being presently raised by the defendant have been hashed and re-hashed by state and federal trial courts and appellate courts over a period of some thirteen years. The present motion for a new trial presents no issue which has not already been adjudicated.

There is no need for a hearing. The defendant's motion for a new trial is denied.

By the Court,

_____

Roger J. Donahue
Regional Administrative Justice
Norfolk County

February 23, 1990

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 90-124

COMMONWEALTH

v.

STEPHEN DOHERTY

ORDER ALLOWING DEFENDANT'S
APPLICATION FOR INTERLOCUTORY APPEAL

This matter came before the Court on the defendant's application for interlocutory appeal.

Upon considering thereof, it is Ordered that the application be, and it hereby is, allowed.

It is further ordered that the Clerk of Norfolk Superior Court shall assemble the record in Norfolk Superior Court No.

68154 and transmit the record to the Supreme Judicial Court for the Commonwealth for determination.

By the Court, (Wilkins, J.)

_____

Clerk

Entered: August 2, 1990

COMMONWEALTH v. STEPHEN DOHERTY

Norfolk. May 7, 1991 - September 12, 1991

Present: Liacos, C.J., Wilkins, Abrams, O'Connor & Greaney, JJ.

Homicide. Intent. Malice. Due Process of Law, Presumption.

Practice, Criminal, Presumptions and burden of proof, Instructions to jury, Postconviction relief. Error, Harmless.

Indictment found and returned in the Superior Court Department on February 3, 1977.

A motion for a new trial, filed on March 9, 1989, in the Supreme Judicial Court for the County of Suffolk, was transferred to the Superior Court Department and was considered by Roger J. Donahue, J.

Robert L. Sheketoff (Anthony M. Cardinale with him) for the defendant.

James Lang, Assistant District Attorney, for the Commonwealth.

The defendant, pro se, submitted a brief.

**WILKINS, J.** On August 7, 1979, this court affirmed the conviction of Stephen Doherty (defendant), John Campbell, Jr., and Arthur Keigney of the November 25, 1976, murder in

the first degree of Robert A. Perrotta (victim) in his cell at the Massachusetts Correctional Institution at Walpole. *Commonwealth v. Campbell*, 378 Mass. 680 (1979). After that date, but before the Supreme Court's decision in *Francis v. Franklin*, 471 U.S. 307 (1985), the defendant on three occasions unsuccessfully sought postconviction relief by way of motions for a new trial and unsuccessfully sought habeas corpus relief in the Federal courts. See *Campbell v. Fair*, 838 F.2d 1 (1st Cir.), *cert. denied*, 488 U.S. 847 (1988).

We deal here with the defendant's fourth motion for a new trial. A judge of the Superior Court denied that motion on the ground that "[t]he issues being presently raised by the defendant have been hashed and re-hashed by state and federal trial courts and appellate courts over a period of some thirteen years." He denied the motion for a new trial because "it presents no issue which has not already been adjudicated."

A single justice of this court, acting under the "gatekeeper" provision of G.L.c. 278, §33E (1990 ed.),

allowed the defendant to appeal to this court from the rejection of his contention that the jury charge contained constitutionally infirm language concerning presumptions of malice and intent.[1] We conclude that the defendant has not waived or otherwise lost his right to a determination on the merits of his challenge to the jury instructions, but that he is not entitled to a new trial.

The evidence justifying the defendant's conviction is set forth in our opinion on the defendant's appeal. *Commonwealth v. Campbell, supra* at 682-685. To make the issues now before us understandable, we need only summarize the general circumstances of the Commonwealth's case. The

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[1]In doing so, the single justice implicitly ruled that the issues as to which the defendant sought leave to appeal were new and substantial. That ruling does not, however, foreclose this court from considering whether the defendant has waived his right to present the issues that are before us.

We do not consider other issues that the defendant argues in his pro se brief as to which no leave to appeal has been granted.

Commonwealth sought to prove, based primarily on the testimony of an inmate named Thomas Carden, that the defendants Campbell and Keigney killed the victim in his cell by strangulation, after tearing his penis from his body. This court characterized the evidence against these two defendants as "somewhat thin" but sufficient to warrant submitting the case to the jury. *Id.* at 688-689. The case against the defendant, called "a somewhat closer question," was based on the theory that the defendant had acted as a lookout for Campbell and Keigney. *Id.* at 688-689.[2]

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[2]We said, "Carden testified that Doherty obstructed his passage to Perrotta's cell shortly before 5 p.m. by placing a hand on his shoulder and engaging in loud conversation. He further testified that Doherty abruptly ceased these activities when Keigney and Campbell emerged from Perrotta's cell. Carden also testified to seeing Doherty leaning over the rail in front of Perrotta's cell just before the body was discovered. The jury might reasonably infer that Doherty was acting as a lookout on both occasions. If they so found, they would be justified in concluding that at the time Keigney and Campbell were murdering Perrotta, Doherty was present near the scene, purposefully aiding and abetting them in the commission of the crime, and that by reason thereof he was guilty as a principal." *Id.*

5. We reject the Commonwealth's claim, accepted by the motion judge, that the defendant has already had appellate review of his challenge to the jury instructions. We also reject the Commonwealth's argument that the defendant has waived his right to such a review. The defendant relies on principles expressed in *Sandstrom v. Montana*, 442 U.S. 510 (1979), decided on June 18, 1979, after oral argument of his appeal but before it was decided on August 7, 1979. This court's opinion on the defendant's appeal did not discuss the jury instructions in light of the *Sandstrom* opinion. The significant force of the defendant's argument arises not from the *Sandstrom* case itself, however, but from the standard for testing the consequences of a *Sandstrom* violation that was first expressed in *Francis v. Franklin*, 471 U.S. 307 (1985). In deciding what a reasonable juror could have understood, a constitutionally infirm jury instruction containing impermissible burden-shifting language is not cured by "[l]anguage that merely contradicts and does not explain [the] constitutionally

infirm instruction." *Id.* at 322.

The importance of *Francis v. Franklin* to the defendant's argument is pointed up significantly in this Commonwealth by the differing results in *Commonwealth v. Repoza*, 382 Mass. 119 (1980) (*Repoza I*), and in *Commonwealth v. Repoza*, 400 Mass. 516 (1987) (*Repoza II*). In *Repoza I*, on our own motion, we reviewed the jury instructions under G.L.c. 278, §33E, and concluded that the instruction that the intentional use of a deadly weapon created a presumption of malice violated *Sandstrom* principles. *Repoza I, supra* at 132-133. We concluded, however, that the judge's error was "vitiated by his repeated and careful instructions reinforcing the principle that the burden of proof on every essential element of the crime invariably remains with the Commonwealth." *Id.* at 134. After the Supreme Court decided *Francis v. Franklin*, we considered the *Sandstrom* issue again in Repoza's challenge to the denial of his postappeal motion for a new trial. We ordered a new trial

(*Repoza II, supra* at 522), concluding that the "saving" language of the charge, which we had identified in *Repoza I*, did not meet the standard of *Francis v. Franklin*. It "did not cure the possibility that, '[i]n light of the instructions on intent given in this case, a reasonable juror could thus have thought that, although intent must be proved beyond a reasonable doubt, proof of [stabbing the victim] and its ordinary consequences constituted proof of intent beyond a reasonable doubt unless the defendant persuaded the jury otherwise.' *Francis, supra* at 319. Clearly, the instructions at trial do not meet the requirements of *Francis*." *Repoza II, supra* at 521-522. See *Commonwealth v. Sires*, 405 Mass. 598, 600-601 (1989), applying *Francis v. Franklin* to a charge given prior to the *Sandstrom* opinion and ordering a new trial, years after an unsuccessful appeal of a conviction of murder in the first degree in *Commonwealth v. Sires*, 370 Mass. 541 (1976).

The defendant argues that his situation is substantially the same as that of Repoza. Repoza was not denied postappeal

relief on the ground that he should have raised the point earlier, even though this court had identified and discussed a *Sandstrom* error on Repoza's appeal.[3] Although there are differences, as we shall see, between Repoza's case and this one in the nature and significance of the alleged errors in the jury instructions, *Repoza II* demonstrates the significance of *Francis v. Franklin* and shows why we must conclude that the defendant has not waived his right to argue the alleged *Sandstrom* error as reinforced by the principles expressed in *Francis v. Franklin*, unless for some reason he has waived that right by inaction after *Francis v. Franklin* was decided.

The defendant's March, 1989, motion for a new trial for the first time raised the *Sandstrom* issue in the context of *Francis v. Franklin*. The Commonwealth does not argue that

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[3]This Court's opinion on the appeal of the defendant now before us did not discuss the jury charge in relation to the *Sandstrom* case. If the opinion had done so, it is most unlikely that the defendant would have fared any better than did Repoza in his appeal (*Repoza I*).

the delay in filing that motion following the decision in *Francis v. Franklin* warrants a ruling that the defendant waived his right to advance the argument when he did. No case of this court has held that a delay of that sort results in the loss of rights. See *Commonwealth v. Burkett*, 396 Mass. 509, 512 (1986). We must, therefore, consider the merits of the defendant's objections to the jury charge.

6. We start with the language contained in the following paragraph, with the assertedly improper language appearing in italics:

> "Our Supreme Judicial Court has said that every unlawful motive may be inferred from an unlawful killing and *if there are no circumstances tending to show justification or excuse, there is nothing to rebut the natural presumption of malice*. And they go on to say that malice does not necessarily imply ill will towards the person killed but it has a more comprehensive meaning, including any intent to inflict injury upon another without legal excuse. *So if a defendant or defendants in this case intentionally, unlawfully killed the deceased, malice is presumed in this case.*"

The question is whether a reasonable juror could have understood the challenged language to direct him or herein the circumstances of this case to accept or presume conclusively the existence of malice solely from the fact that there was a killing. See *Francis v. Franklin*, *supra* at 325. We think not.

The trial judge summed up his statements in the last sentence of the quoted paragraph, explaining his earlier ones. He says that, if the killing was done intentionally and unlawfully, "malice is presumed in this case." Because there was no evidence warranting a manslaughter verdict, the judge's conclusional statement was correct in this case. In other words, because there was no basis for a manslaughter verdict, if the jury were to find that the killing was intentional and unlawful, the killing was committed with malice as a matter of law. "The jury in this case reasonably could not have understood from the judge's instructions that, if they found that the defendant killed the victim, and if there was no evidence of justification or excuse, either malice had been established

conclusively or the defendant had the burden to prove lack of malice. The jury reasonably could have understood the statement in question only to refer to an intention killing. an intentional killing without justification or excuse is indeed an unlawful killing with malice aforethought, and is murder." *Commonwealth v. Adrey*, 397 Mass. 751, 755 (1986).

The word "presumed" in the charge does not have an unconstitutional quality in a *Sandstrom* sense because, where there is no evidence warranting a finding of manslaughter and self-defense is not an issue, there is malice in all situations where a killing is intentional. Indeed, the reference to "an unlawful killing" in the first sentence of the allegedly offending paragraph seems reasonably to say correctly, on these facts, that "the natural presumption of malice" arises when (a) there is no justification or excuse and (b) the killing is unlawful.[4]

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[4]For completeness, a reference to the absence of a basis for a finding of involuntary manslaughter would be appropriate, although not required on the facts of this case.

This challenged language may be artless. It may be unclear. It might well be bad in the *Sandstrom* sense if used in other cases, such as those in which a finding of guilt of manslaughter is a possible verdict. Where, however, there was no evidence justifying a finding of involuntary manslaughter or raising a reasonable doubt whether the killing was excused or justified, a presumption of (or, stated in better language, a finding of) malice (and murder) is required if the killing was unlawful or if it was intentional. Consequently, we find no *Sandstrom* error in the challenged language in the paragraph quoted above.

7. The defendant's second objection to the judge's instructions presents a more difficult issue. The portion of the charge to which the defendant objects, with the specifically challenged language in italics, reads as follows:

> "So how do you determine what is in someone's mind? Naturally, that is extremely difficult and so the law allows you to work backwards by taking the effect or killing, if you will, determining

> the killing, and inferring from that killing and from the acts of the participants what their intent was. *We are presumed to intend to do what we do do. Otherwise, we wouldn't have done it.*"

The statement that "we are presumed to intend to do what we do do" could be understood in context to say that a person is presumed to have intended to kill if that is the result of what he did do. The words have the potential of being understood to create a presumption, probable a rebuttable one, that runs afoul of *Sandstrom* principles. See *Sandstrom v. Montana, supra* at 519. As to all the defendants, but particularly as to the two coventurers, Campbell and Keigney, the faulty language, if considered in isolation, might be perceived, because of the fact of the killing alone, as relieving the Commonwealth of its burden of proving malice beyond a reasonable doubt.

The malice of the principals was not, however, a disputed issue at the trial. The strangulation of the victim with

two bathrobe cords and the dismemberment of his penis demonstrated conclusively that whoever committed these acts did so intentionally. See *Commonwealth v. Campbell*, 378 Mass. 680, 684-685 (1979). By contrast, *Francis v. Franklin* involved a case in which the "facts did not overwhelmingly preclude" the absence of an intent to kill. *Francis v. Franklin*, *supra* at 325-326. See *Repoza II*, characterizing *Francis v. Franklin* as a case that "specifically concerns the limited category of criminal prosecutions in which intent is the pivotal element of the crime charged and the only contested issue at trial." *Repoza II, supra* at 519.[5] Here, the matter of the principals' intent was not in dispute, unlike the situation in Repoza's case. See *Repoza II, supra* at 522 n.7 ("intent was a live issue and the error cannot be considered to be harmless beyond a reasonable doubt"). The contested issues were

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[5]We think that the issue must be contested and that, if it is, *Francis v. Franklin* principles apply even if it is not the only contested issue.

whether either Campbell or Keigney, or both, committed the acts that caused the victim's death and whether the defendant was a coventurer with one or both of them, sharing the same intent.

The question whether any *Sandstrom* error in this charge concerning intent was harmless error is a Federal constitutional one. We shall consider whether the Supreme Court of the United States would apply a harmless error rule in the circumstances to excuse the arguably flawed instruction. It is established that "the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), applies to jury instructions that violate the principles of [*Sandstrom*] and *Francis v. Franklin*." *Rose v. Clark*, 478 U.S. 570, 572 (1986).

The Supreme Court has very recently spelled out the standard for determining whether an instruction to apply an unconstitutional presumption did not contribute to the verdict and hence was harmless error. *Yates v. Evatt*, 111 S.Ct. 1884, 1893-1894 (1991). "To say that an error did not contribute to

the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption." *Id.* at 1893.

The Court said that appropriate judicial analysis requires (1) a determination of what evidence the jury were warranted in considering in reaching their verdict based on the instructions the jury received ("Did the jury look at only the predicate facts, or did it consider other evidence bearing on the fact subject to the presumption?") and (2) a weighing of the probative force of that evidence against the probative force of the presumption standing alone to determine "whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the

presumption." *Id.*

The trial judge defined malice in his charge and, as we have already stated, the fact of the strangulation of the victim with two bathrobe cords provides powerful proof of malice in the killing. Any statement in the second quoted portion of the charge that malice is presumed from the killing was beyond any reasonable doubt inconsequential to the jury's verdict. Malice in the killing by strangulation was not contested by any defendant at the trial.

We turn to a consideration of the instruction -- that a person is presumed to intend to do what he does do -- as specifically applied to the case against the defendant. When we do so, any *Sandstrom* error as to the defendant appears immaterial and harmless in all respects. The Commonwealth never claimed that the defendant committed the killing. He never did anything to the victim or otherwise, that could have caused a reasonable juror, hearing the challenged charge, to presume any contested fact of the Commonwealth's case

against the defendant. The question whether the defendant shared the intent of Campbell and Keigney was a very live, important, and seemingly close question for the jury. The challenged instructions, however, had nothing to do with the jury's consideration of that issue as the judge gave that issue to the jury.

When the defendant prevented Carden from moving along the catwalk to the victim's cell about two and one-half hours before the killing and when the defendant leaned over the rail in front of the victim's cell shortly before Keigney and Campbell left the victim's cell at a fast pace and Carden found the victim's body, the defendant intended to do what he did on each occasion, as the challenged charge indicates. The question whether the defendant intended to have happen what Campbell and Keigney did to the victim is a separate question, on which the jury were separately instructed unaffected by any *Sandstrom* and *Francis v. Franklin* error.

8. The teaching of *Francis v. Franklin* may not permit us to weigh the charge as a whole (except to the extent that a constitutional error is explained away by other language). We have, therefore, not done so. On the other hand, based on the charge in this case, a reasonable juror would not have been likely to have presumed any contested fact against the defendant. To conclude that a reasonable juror *could* have done so, the *Francis v. Franklin* standard, by an analysis of ambiguous language ("intend to do what we do do") heard once in the judge's charge would be an extreme position. Lawyers and judges parse challenged jury instructions, with days to reflect on language that appears before them in writing, to satisfy themselves whether an instruction is or is not constitutionally correct. Lay people hear the judge's words, untuned by training to the implication of the words and unaided by having them in writing. In such situations, the reasonable impression that a jury would have from the judge's instructions as to their fact-finding obligations should be an important

factor in deciding the merits of a claim that ambiguous language in a charge creates an impermissible presumption requiring reversal of the conviction. This seems to be what the Supreme Court is saying in *Yates v. Evatt, supra.*

The judge told the jury that, if they become convinced beyond a reasonable doubt that one of the defendants killed the victim, the jury would have to consider the question of joint enterprise. He told them that the defendant could be guilty of murder only if he intended grievous harm to the victim. "[Y]ou must have made a determination beyond a reasonable doubt that this design and purpose existed in the minds of each of these men." Later the judge said, "[A]s to the defendant Doherty, . . . to be included in the joint enterprise, you must find that he must have shared the common intent." No reasonable juror should have been or, we submit, could have been misled by the challenged instructions to presume any contested fact against the defendant.

The judge did not instruct the jury that Doherty is presumed to intend to do what Campbell and Keigney did do. The arguably defective presumption language can only be read reasonably to apply to what Doherty did do himself. The challenged instruction, therefore, had no bearing on the question whether Doherty shared Campbell's and Keigney's intent. We simply disagree with the assertion to the contrary in the dissenting opinion.

9. The order denying the defendant's 1989 motion for a new trial is affirmed.

So ordered.

**O'CONNOR, J. (dissenting).** As the court notes, *ante* at ___, in *Commonwealth v. Campbell*, 378 Mass. 680, 688-689 (1979), the court characterized the case against Doherty's codefendants as "somewhat thin," and, by comparison, the case against Doherty as presenting "a somewhat closer question." The case against Doherty was based on the theory that, at the time Keigney and Campbell were murdering Perrotta, Doherty was acting as a lookout, "purposefully aiding and abetting them in the commission of the crime, and that by reason thereof he was guilty as a principal." *Id.* at 689. Therefore, as the court properly recognizes, "[t]he question whether the defendant [Doherty] shared the intent of Campbell and Keigney was a very live, important, and seemingly close question for the jury." *Ante* at _____.

With respect to that very live, important, and close question, the judge instructed the jury that "[w]e are presumed to intend to do what we do do. Otherwise, we wouldn't have done it." That instruction, the court acknowledges, "could be

understood in context to say that a person is presumed to have intended to kill if that is the result of what he did do. The words have the potential of being understood to create a presumption, probably a rebuttable one, that runs afoul of *Sandstrom* principles." *Ante* at ____. Nevertheless, in spite of its conclusion that the jury were given a constitutionally incorrect instruction with respect to the pivotal issue in the Commonwealth's case against Doherty, the court characterizes the error as harmless, and affirms the order denying Doherty's 1989 motion for a new trial. The court reasons that the presumption motion for a new trial. The court reasons that the presumption instruction was harmless because a reasonable juror would have understood that instruction to mean only that, "[w]hen [Doherty] prevented Carden from moving along the catwalk . . . and when [he] leaned over the rail in front of the victim's cell," Doherty intended to prevent Carden from moving along the catwalk and Doherty intended to lean over the rail. *Ante* at _____. Those are matters about which there

could have been no reasonable dispute. According to the court, the faulty instruction would not have gone further. That is, the court says, the instruction would not have suggested to a reasonable juror that when Doherty, by acting as a lookout, helped Keigney and Campbell to murder Perrotta, he is presumed to have shared their murderous intent. I disagree.

If Doherty's conduct created a presumption that he intended to do what he did, why would not Doherty's aiding and abetting a murder, which the jury would have been entirely justified in finding he did, create a presumption that he intended to do so? In my view, a reasonable juror could well have understood that instruction that "[w]e are presumed to intend to do what we do do" to mean that, if Doherty's conduct aided and abetted a murder, he is presumed to have intended that his conduct would aid and abet a murder. Furthermore, in the absence of such a presumption, the evidence was weak not only with respect to when Keigney and Campbell formed their murderous intention (perhaps it was

after they reached Perrotta's cell), but also with respect to what Doherty knew of their intention when he undertook to function as a lookout. The mere fact that Doherty knew that Keigney and Campbell wanted their meeting with Perrotta to be undetected by prison personnel says little, and perhaps not enough to have satisfied the jury, had they been properly instructed, about whether Doherty intended to help Keigney and Doherty do what they ultimately did, that is, murder Perrotta. The error was far from harmless. I would reverse the order denying Doherty a new trial.